

3-22-2010

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## Recommended Citation

Jake Goodman, *The Grease in the Gears: Impunity in the Democratic Republic of Congo and the Opportunity for Peace*, 32 Loy. L.A. Int'l & Comp. L. Rev. 209 (2010).  
Available at: <http://digitalcommons.lmu.edu/ilr/vol32/iss2/2>

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# The Grease in the Gears: Impunity in the Democratic Republic of Congo and the Opportunity for Peace

JAKE GOODMAN\*

## I. INTRODUCTION

The ongoing war in the Democratic Republic of Congo<sup>1</sup> is the deadliest conflict since World War II, and the world's deadliest humanitarian crisis.<sup>2</sup> Between 1998 and 2008, 5.4 million people died from war-related causes—most from easily preventable diseases and malnutrition rather than direct acts of violence—as the state struggled to provide basic security.<sup>3</sup> Rebel groups and the Congolese army continue to wreak havoc in the eastern Congo, despite a comprehensive peace agreement, the establishment of a democratically elected government that improved security in many portions of the country, and the encouraging of cooperation between the Rwandan and Congolese governments.<sup>4</sup> Prospects for a lasting peace remain doubtful.

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\* International Policy Fellow, Human Rights First; J.D. Georgetown University Law Center, 2009, B.A. Rutgers University, 2005. This article reflects my own personal views and not necessarily those of Human Rights First. This article is current through August 2009. I am very grateful to Professors Jane Stromseth, Jonathan Drimmer, and Russell Goodman for their invaluable guidance on earlier drafts. My deepest thanks to Anne, Russell, Elizabeth, and Ruth Goodman for their unfailing support and encouragement.

1. The Democratic Republic of Congo is alternatively referred to as the “DRC” or “Congo” throughout this paper.

2. INT’L RESCUE COMM., MORTALITY IN THE DEMOCRATIC REPUBLIC OF CONGO: AN ONGOING CRISIS ii (2008), available at [http://www.theirc.org/resources/2007/2006-7\\_congomortalitysurvey.pdf](http://www.theirc.org/resources/2007/2006-7_congomortalitysurvey.pdf); Benjamin Coughlan et al., *Mortality in the Democratic Republic of Congo: A Nationwide Survey*, 367 THE LANCET 44 (2006).

3. INT’L RESCUE COMM., *supra* note 2, at ii-iii.

4. *DR Congo: 100,000 Civilians at Risk of Attack*, HUM. RTS. WATCH, Apr. 29, 2009, <http://www.hrw.org/en/news/2009/04/29/dr-congo-100000-civilians-risk-attack>.

In addition to the staggering number of deaths, the war in the Congo has produced horrific human rights abuses.<sup>5</sup> The price paid for the comprehensive peace agreement was impunity for those most responsible for the atrocities. Rather than risk derailing the shaky peace process by aggressively prosecuting human rights abusers, the strategy of the transition was to purchase stability by distributing lucrative and powerful government positions to armed groups, regardless of their human rights records. In this way, "in the words of one human rights worker in Kinshasa, 'impunity greased the gears of the transition.'"<sup>6</sup>

In the broader debate about the proper balance of peace and justice in conflict settings, the DRC is a case study of the possible consequences of prioritizing peace over justice. This paper traces the history of impunity in the peace process, and argues that several powerful factors contributed to the low priority given to justice in the DRC's transition. While the peace agreement produced favorable results in the short term, its strategy of appeasement and impunity for human rights violators is unlikely to produce long-term peace, and should be abandoned. Rather than threatening the peace process, ending the culture of impunity is a necessary and positive contribution to it. The arrest and trial before the International Criminal Court ("ICC") of prominent rebel leaders in the Kivus, the epicenter of the conflict today, would be a valuable and necessary step in paving the way for long-term peace.

In developing this argument, this paper first sets the peace process in context by providing a brief outline of the conflict's background in Part II. Part III then analyzes the transitional government's substance and structure, concluding that justice was deemphasized in the peace and transition, while Part IV posits four interwoven factors that explain the low priority given to justice. Part V analyzes the legacy of the transition, arguing that continuing the strategy of appeasement and high-level government appointments, with impunity for human rights violations, will doom the DRC to eternal conflict. Finally, Part VI focuses on the

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5. Reducing the enormous literature on human rights abuses in the Congo to a single list here would be of limited use. Instead, I will refer to particular reports throughout the paper as they become relevant.

6. Jason K. Stearns, *Congo's Peace: Miracle or Mirage?*, 106 CURRENT HIST. 202, 205 (2007), available at <http://www.crisisgroup.org/home/index.cfm?id=4799&l=1>.

conflict in the eastern Congo, and argues that piercing the armor of impunity through the arrest and trial of prominent rebels in the area would be a necessary and positive contribution to a lasting peace. The article also suggests the ICC as a possible vehicle for imposing this accountability.

## II. THE CONFLICT IN THE CONGO

The conflict in the Congo is exceptionally complicated, and a thorough analysis of the current crisis's context is beyond the scope of this paper. Instead, this section will provide a history of the conflict through the Final Act of the inter-Congolese dialogue in 2003, as background for the discussion of more recent history of the conflict and the role of international criminal law in the peace process that follows.

The DRC has been in a state of conflict, with only occasional respite, since the overthrow of Mobutu Sese Seko in May of 1997. Following thirty-two years of brutal and exceedingly corrupt dictatorship,<sup>7</sup> a coalition of nations led principally by Rwanda and Uganda,<sup>8</sup> backed a rebel invasion that toppled the Mobutu regime<sup>9</sup> and installed Laurent Kabila, a Congolese citizen from Katanga,<sup>9</sup> as the head of state. Kabila quickly fell out of favor with his Rwandan and Ugandan backers, each of whom re-invaded, setting up proxy rebel groups throughout the country<sup>10</sup> and threatening to topple Kabila's nascent regime in Kinshasa.<sup>11</sup> Only the timely

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7. For a compelling study of the Congo under Mobutu, see generally MICHELA WRONG, *IN THE FOOTSTEPS OF MR. KURTZ: LIVING ON THE BRINK OF DISASTER IN MOBUTU'S CONGO* (HarperCollins Publishers 2001) (2000).

8. While there is some debate as to the particular roles that each of Kabila's supporters played in the rebellion, there is a consensus among scholars that Rwanda and to a lesser extent Uganda were deeply involved. See Stearns, *supra* note 6, at 202 (stating that Kabila was materially supported by a coalition of Rwanda, Uganda, Angola, and Eritrea); FEDERICO BORELLO, *INT'L CTR. FOR TRANSITIONAL JUSTICE, A FIRST FEW STEPS: THE LONG ROAD TO A JUST PEACE IN THE DEMOCRATIC REPUBLIC OF THE CONGO* vii (Oct. 2004) (stating that Rwanda and Uganda were Kabila's principal supporters); THOMAS TURNER, *THE CONGO WARS: CONFLICT, MYTH AND REALITY* 5 (2007) (arguing that Rwanda had planned and directed the "so-called rebellion").

9. Katanga is one of ten provinces in the DRC.

10. TURNER, *supra* note 8, at 5-7. Rwanda and Uganda jointly created the Rassemblement Congolais Pour La Democratie (RCD), but a struggle for control of the RCD prompted Uganda to back its own rebel group, the Mouvement pour la Liberation du Congo (MLC).

11. Howard W. French, *Rebels Closing in on Blacked-Out Congo Capital*, N.Y. TIMES, Aug. 14, 1998, at A1.

intervention of troops from Zimbabwe, Angola, and Namibia prevented such an outcome.<sup>12</sup>

While the intervention saved Kabila's regime, eight countries were drawn into the conflict that quickly descended into a chaotic stalemate—dubbed Africa's first world war—with a dizzying array of motives and objectives pursued by each state involved.<sup>13</sup> Non-state actors, acting independently or with the secret support of one of the states involved, further complicated the crisis. The Rwandan-backed Rassemblement Congolais pour la Democratie (RDC) and the Ugandan-backed Mouvement Pour la Liberation du Congo (MLC) rebel groups exercised loose control over the eastern and northern Congo respectively.<sup>14</sup> Portions of each faction splintered into a dozen marauding armed groups, with constantly shifting allegiances and undefined objectives.<sup>15</sup> As outlined in several UN reports, all parties involved sought to control and exploit the DRC's vast mineral wealth.<sup>16</sup> The Lusaka Ceasefire Agreement, optimistically signed in the summer of 1999, proved toothless, and fighting resumed almost immediately with each of the many parties accusing every other of violating the vague terms of the agreement.<sup>17</sup> It did, however, pave the way for the United Nations Mission in the Democratic Republic of Congo (MONUC).<sup>18</sup> Laurent Kabil, assassinated in January of 2001, was succeeded by his son, Joseph Kabila, spurring new optimism for a

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12. TURNER, *supra* note 8, at 6.

13. Ian Fisher & Norimitsu Onishi, *Many Armies Ravage Rich Land in the 'First World War' of Africa*, N.Y. TIMES, Feb. 6, 2000, at 1.

14. *Id.*

15. Keith Somerville, *DR Congo Awash with Rebels*, BBC NEWS, July 23, 2002, <http://news.bbc.co.uk/2/hi/africa/2146537.stm>.

16. *Sanctions Urged for Congo Plunderers*, BBC NEWS, Oct. 21, 2002, <http://news.bbc.co.uk/2/hi/business/2345727.stm>. For an authoritative analysis on the role of mineral plunder in the Congo's conflict, see HUMAN RIGHTS WATCH, *THE CURSE OF GOLD: DEMOCRATIC REPUBLIC OF CONGO* (2005) [hereinafter *THE CURSE OF GOLD*].

17. See INT'L CRISIS GROUP, *AFRICA REPORT NO. 26, SCRAMBLE FOR THE CONGO: ANATOMY OF AN UGLY WAR* (Dec. 20, 2000). The Lusaka agreement relied exclusively on the cooperation of the parties, with no independent organization to police, much less enforce, its terms. The agreement reflected the international community's desire for a low-cost solution to the conflict.

18. Security Council Resolution 1258, passed on August 6, 1999, authorized the deployment of ninety military liaison officers to the state capitals of the parties, with a mandate to provide technical assistance and information regarding the situation on the ground to the Secretary General. S.C. Res. 1258, U.N. Doc. S/RES/1258 (Aug. 6, 1999).

peaceful settlement of the conflict.<sup>19</sup> In July, Rwanda pledged to withdraw its troops in exchange for a crackdown on Hutu militias in the Kivus.<sup>20</sup> Uganda soon followed.<sup>21</sup> In December 2002, a fragile peace agreement, brokered mainly by South Africa, followed a series of drawn out negotiations between the main rebel groups and the Kabila government. The power sharing agreement, reached on December 16, 2002, in Pretoria, paved the way for the transitional government in June 2003.<sup>22</sup> The Final Act of the inter-Congolese dialogue, signed in April 2003, solidified the agreement and laid out the terms of the transition.<sup>23</sup> This agreement provided the framework for the peace process and transition in the DRC.

### III. THE TRANSITION

#### A. *The Substance of the Transition Agreement*

The power sharing agreement employed a realpolitik approach to the conflict, privileging short-term cessation of hostilities over a just and accountable peace that addressed the underlying causes of violence. With only slight exception, to be discussed below, accountability for the staggering human rights atrocities committed throughout the conflict was conspicuously absent from the negotiations. The primary strategy employed at the negotiations was to persuade each warring party to give up its arms in exchange for extremely lucrative positions of power within the newly formed transitional government.

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19. Christopher S. Wren, *Congo's New Leader, at the U.N., Pledges Talks With War Foes*, N.Y. TIMES, Feb. 3, 2001, at A7.

20. Mark Lacey, *Congo Peace Accord Evokes Cautious Hopes*, N.Y. TIMES, Aug. 6, 2002, at A3.

21. Marc Lacey, *Congo: Troubles Continue as Pullout Begins*, N.Y. TIMES, Aug. 30, 2002, at A8. Zimbabwe, Namibia, and Angola agreed to withdraw along with Uganda.

22. James Lamont, *Power-Sharing Deal May End Congo War*, FIN. TIMES, Dec. 18, 2002, at 12.

23. The Final Agreement comprised "the Global and All-Inclusive Agreement on the Transition in the DRC, signed in December 2002 in Pretoria, the Transitional Constitution, the Memorandum on Military and Security Issues of March 2003, and the 36 resolutions adopted by the inter-Congolese dialogue in April 2002." *The Democratic Republic of Congo Peace Accords: One Year Later: Hearing Before the Subcomm. on Africa of the Comm. on Int'l Relations H.R.*, 108th Cong. 9 (2004) (statement of Constance Barry Newman, Assistant Sec'y, Bureau of African Affairs, Dep't of State), available at <http://www.foreignaffairs.house.gov/archives/108/94990.pdf>.

The substance of the agreement makes plain the strategy of the negotiating parties. Two key factors indicate the degree to which justice and accountability were set aside in favor of immediate peace: the prominent role given to reported human rights abusers in the transitional government, and the weakness of accountability measures written into the agreement. Each will be examined in turn.

### *B. The Structure of the New Government*

Under the Final Act, the Transitional Government was led by President Joseph Kabila, supported by four vice presidents, known as "Formula 1 + 4."<sup>24</sup> The vice presidents were to come from the various negotiating parties, and each was to run a particular portion of the Transition. The Congolese Rally for Democracy (RCD) would appoint a vice president in charge of the Political Committee; the Movement for the Liberation of Congo (MLC) would run the Economic and Finance Committee; Kabila's government would appoint the vice president to run the Committee for Reconstruction and Development; and the legitimate political opposition would appoint a vice president to run the Social and Cultural Committee.<sup>25</sup> The agreement called for thirty six ministers and twenty five vice ministers, as well as a 500 member National Assembly and a 120 member Senate.<sup>26</sup> All posts, including those in the National Assembly and Senate, were made by appointments divvied up among the parties to the agreement.<sup>27</sup>

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24. Thierry Kambere, Program Officer, Global Rights, Prospects for Justice in the Democratic Republic of Congo: A Global Rights Discussion Forum, (Apr. 3, 2006) (summary of remarks available at [www.globalrights.org/site/DocServer/DRC\\_April\\_06.pdf?docID=5023](http://www.globalrights.org/site/DocServer/DRC_April_06.pdf?docID=5023)) [hereinafter Prospects for Justice].

25. Global and Inclusive Agreement on Transition in the Democratic Republic of the Congo, at 7, Dec. 16, 2002, available at [http://www.reliefweb.int/rw/RWFiles2004.nsf/FilesByRWDocUNIDFileName/MHII-65G8B8-gov-cod-16dec-02.pdf/\\$File/gov-cod-16dec-02.pdf](http://www.reliefweb.int/rw/RWFiles2004.nsf/FilesByRWDocUNIDFileName/MHII-65G8B8-gov-cod-16dec-02.pdf/$File/gov-cod-16dec-02.pdf) [hereinafter Global and Inclusive Agreement].

26. *Id.* at 9, 15-16.

27. "During the negotiation process, the government of the Republic was represented by the former government led by President Joseph Kabila. Rebel groups were represented by the Rwanda-backed Congolese Rally for Democracy (Rassemblement Congolais pour la Démocratie, RCD-Goma), the Uganda-backed Movement for the Liberation of Congo (Mouvement pour la Libération du Congo, MLC), the Congolese Rally for Democracy-National (Rassemblement Congolais pour la Démocratie-National (RCDN), the Congolese Rally for Democracy/Kisangani-Liberation Movement (Rassemblement Congolais pour la Démocratie/Kisangani-Mouvement de Libération, RCD/K-ML). Non-armed political opposition parties were represented by the Union for Democracy and

These positions were to be held until national elections, provisionally scheduled for 2005.<sup>28</sup> The agreement put the main rebel groups into positions of impressive power, while buying the cooperation of potentially troublesome factions by elevating the “smaller, auxiliary parties—political opposition groups, civil society, and three small rebel movements—from minor players to highranking positions.”<sup>29</sup> The Congo’s vast mineral wealth assured that all parties were extremely well-paid,<sup>30</sup> and the opportunity to use newfound positions of power to spread wealth among each constituency was plentiful. For example, each vice-president was afforded \$250,000 per month for himself and his staff, while ministers and parliamentarians were afforded \$4,000 and \$1,500 a month respectively.<sup>31</sup> Directors of state-run companies, whose appointments were shared among the signatories, made up to \$20,000 a month.<sup>32</sup> In this way, money and influence purchased peace and the promise of a democratically elected government. The human rights abuses of those promoted to positions of power within the transitional government are well documented.<sup>33</sup> As Thierry Kambere, a Global Rights Program Officer in Kinshasa, states, “‘Formula 1+ 4’ was the price for peace. It’s bitter, but the

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Social Progress (Union pour la Démocratie et le Progrès Social, UDPS), Unified Lumumbist Party (Parti Lumumbiste Unifié, PALU), National Congolese Movement-Lumumba (Mouvement National Congolais-Lumumba, M.N.C./L), Popular Movement for the Revolution-Fait Privé (Mouvement Populaire de la Revolution-Fait Privé (MPR-Fait Privé), Innovative Forces for Union and Solidarity (Forces Novatrices pour l’Union et la Solidarité, FONUS) and Democratic and Social Christian Party (Parti Social et Démocrate Chrétien, PDSC).” Theodore Kasongo Kamwimbi, *The DRC Elections, Reconciliation and Justice*, Pambazuka News, July 27, 2006, <http://www.pambazuka.org/en/category/features/36231/print>.

28. Lamont, *supra* note 22.

29. See Stearns, *supra* note 6, at 202-03.

30. See THE CURSE OF GOLD, *supra* note 16, at 12-22.

31. Stearns, *supra* note 6, at 203.

32. *Id.*

33. The volume of literature documenting the human rights abuses is impressive. For illustrative reporting, see generally Human Rights Watch, *War Crimes in Kisangani: The Response of Rwandan-Backed Rebels to the May 2002 Mutiny*, 14 HUM. RTS. WATCH (2002) No. 6(A), available at <http://www.hrw.org/sites/default/files/reports/DRC0802.pdf> [hereinafter *War Crimes in Kisangani*] (outlining specifically the abuses of top commanders of the RCD); HUMAN RIGHTS WATCH, *THE WAR WITHIN THE WAR: SEXUAL VIOLENCE AGAINST WOMEN AND GIRLS IN EASTERN CONGO* (2002) (describing abuses by all parties to the conflict); Amnesty Int’l, *Democratic Republic of Congo: Rwandese-Controlled East: Devastating Human Toll*, AI Index AFR 62/011/2001, June 19, 2001 [hereinafter *Rwandese-Controlled East: Devastating Human Toll*] (describing human rights abuses by all parties in the eastern Congo).



Congolese people must accept that perpetrators of crimes run the country.”<sup>34</sup>

### C. *The Weakness of the Accountability Measures*

Though armed groups insisted an amnesty provision be included in the Final Act, its terms left significant room for the punishment of gross violations of human rights. The Final Act's weakness in accountability, then, results from the inadequacy of positive accountability measures, rather than from the amnesty provision itself.

Rebel groups initially sought a blanket amnesty covering the full spectrum of crimes, including war crimes and crimes against humanity.<sup>35</sup> However, the amnesty provision adopted in the Final Act was limited, and did not cover egregious violations of human rights.<sup>36</sup> It declared that “[t]o achieve national reconciliation,” amnesty would be granted for “acts of war” and “political and opinion breaches of the law.”<sup>37</sup> However, it explicitly excepted from coverage genocide, war crimes, and crimes against humanity.<sup>38</sup> Despite criticism that the provision was insufficiently specific to avoid abuse,<sup>39</sup> leading human rights organizations have characterized the wording as “clearly excluding all serious human rights violations from the scope of the application of the amnesty law.”<sup>40</sup> The Final Act follows the best practices of amnesties in peace negotiations, and is in line with international law forbidding amnesty for war crimes, crimes against humanity, and genocide.<sup>41</sup>

Though the amnesty provision provided room for accountability for human rights violations, the Final Act lacked any robust mechanism for prosecution of such violations. The sole positive accountability measure contemplated by the parties was a Truth and Reconciliation Commission. While truth and

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34. Prospects for Justice, *supra* note 24.

35. LAURA DAVIS & PRISCILLA HAYNER, INT'L CTR. FOR TRANSITIONAL JUSTICE, *DIFFICULT PEACE, LIMITED JUSTICE: TEN YEARS OF PEACEMAKING IN THE DRC* 16 (2009).

36. See generally Global and Inclusive Agreement, *supra* note 25.

37. *Id.* § III.8; The amnesty was formalized by Presidential Decree in 2003, and passed by the legislature in 2005. *DR Congo Parliament Backs Amnesty*, BBC NEWS, Nov. 30 2005, <http://news.bbc.co.uk/2/hi/africa/4485916.stm>.

38. Global and Inclusive Agreement, *supra* note 25, § III.8.

39. Prospects for Justice, *supra* note 24.

40. BORELLO, *supra* note 8, at 24.

41. DAVIS & HAYNER, *supra* note 35, at 16.

reconciliation commissions have been effective accountability and reconciliation bodies in a number of contexts,<sup>42</sup> the Global Agreement's commitment to the commission was cosmetic at best. The full text of the commitment can be found under Article V's listing of Transitional Institutions, which stipulates that a number of "institutions supporting democracy shall be set up," among them "The Truth and Reconciliation Commission."<sup>43</sup> As a result of the vague wording, the substance of the Commission's mandate and structure was left to be decided by the very parties the TRC would investigate. Thus, the TRC was "constrained from the start by its composition," as the inclusion of groups "known to have committed egregious human rights abuses" created a clear conflict of interest that stymied an effective commission.<sup>44</sup> The TRC bided its time for several years before quietly ending in June 2006.<sup>45</sup> In that time, it did not investigate a single case.<sup>46</sup> The Agreement does not mention any other accountability mechanism, nor does it mention accountability for past human rights atrocities at any point.

The combination of power sharing without vetting gross human rights violators and little more than hypothetical accountability measures reflected the negotiating parties' primary interest in achieving an immediate peace. As Jason Stearns, a well-respected Congo analyst, concluded, "[i]n contrast with peace processes elsewhere, justice and reconciliation have ranked low on the list of priorities in Congo."<sup>47</sup>

#### IV. FACTORS CONTRIBUTING TO THE LOW PRIORITY GIVEN TO JUSTICE

This section argues that four interwoven factors contributed to the low priority assigned to justice in the Final Act and Transition: (1) the staggering human toll of the conflict; (2) the lack of political will of the negotiating parties; (3) the weakness of

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42. For a good discussion of the role of truth and reconciliation commissions in, inter alia, South Africa, Argentina, El Salvador, and Chile, see PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY* 32-45 (2001).

43. Global and Inclusive Agreement, *supra* note 25, § V.

44. DAVIS & HAYNER, *supra* note 35 at 21.

45. *Id.* at 22.

46. *Id.*

47. Stearns, *supra* note 6, at 205.

the central state; and (4) the lack of international community interest.

First, the human toll of the conflict in the Congo was utterly overwhelming. The numbers speak for themselves. Between 1998 and 2004, nearly four million people died.<sup>48</sup> Most of these deaths resulted from disease and hunger, as low-level violence cut off basic services and displaced millions.<sup>49</sup> The total breakdown of security left human rights at the mercy of bands of marauders. It would be difficult to overstate the extent of the horrors inflicted on the population of the Congo at the time of the Final Act.

The terror left the country in a state of profound war fatigue. Prior to and during the negotiations, commentators found war fatigue to be a reason for hope. A September 2003 report listed first among its "Sources of Optimism" the fact that "war fatigue leads the overwhelming majority of Congolese to profoundly yearn for an end to the horribly deadly conflict."<sup>50</sup> As early as 1999, UN Humanitarian Coordinator Dariussh Bayandor claimed that war fatigue had already set in, and that "[p]eople in all parts of the DRC . . . cry out for peace."<sup>51</sup>

While war fatigue may well promote conflict resolution by readying parties for compromise, it seems intuitive that negotiations under the stress of war fatigue will encourage short-term solutions. This was the case in the Congo. With thousands dying,<sup>52</sup> thousands more raped each day,<sup>53</sup> blood on the hands of all parties, and no end in sight, the incentives to focus on ending the violence at all costs were enormous. Accountability for yesterday's atrocities seemed less important than preventing those of today and tomorrow. While this is a classic situation in which "the prerogatives of peacemaking collide with the prerogatives of achieving justice for violations of the human person in times of

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48. Coughlan et al., *supra* note 2, at 49.

49. *Id.* at 44, 50.

50. EMERIC ROGIER, REPORT ON ISS INT'L EXPERT WORKSHOP: MONUC AND THE CHALLENGES OF PEACE IMPLEMENTATION IN THE DEMOCRATIC REPUBLIC OF CONGO 2 (Sep. 2003).

51. Press Release, UN Humanitarian Coordinator, UN Humanitarian Missions Behind the Ceasefire Line (Oct. 10, 1999), available at [http://www.africa.upenn.edu/Hornet/irin\\_101299.html](http://www.africa.upenn.edu/Hornet/irin_101299.html).

52. James Astill, *The Land Where Rape Is an Everyday Horror*, THE GUARDIAN (U.K.), May 18, 2002, <http://www.guardian.co.uk/world/2002/may/18/jamesastill>.

53. *Id.*

war,”<sup>54</sup> the scale of the daily human toll in the Congo produced a need to simply end the conflict as soon as possible. A good faith desire to bring justice to human rights violators could easily be subsumed by the enormity of the consequences of delaying peace.

Second, the parties around the negotiating table simply did not have the will to make justice a part of the negotiations. Put plainly, the negotiating parties did not prioritize justice in the peace process for fear of being subjected to prosecution themselves. Representatives of the government, army, RCD, MLC, and other armed groups had good reason to fear effective accountability measures—each had a substantial amount of blood on its hands. An International Center for Transitional Justice report summarized the extent of culpability:

Many, if not all, sides to the conflict have regularly employed the tactic of murdering, raping, maiming, and terrorizing civilians. Most rebels have engaged in continued recruitment of child soldiers; rape and sexual violence is commonplace; horrendous acts like cannibalism, mutilation, and the burying of live people have been reported over the years by Congolese and international organizations. The consequences for Congolese society have been devastating.<sup>55</sup>

The negotiating parties, then, had little interest in holding themselves accountable. They had every incentive to deemphasize justice in the peace process.

Third, the weakness of the central state meant that, even if the political will could be summoned, accountability measures would likely be impossible to achieve. Government forces were in the unenviable position of negotiating without a credible military threat. The Congolese army, acting without the support of more professional regional powers, was “simply not up to the task of imposing the authority of the government,” forcing the government to “fall back on alliances with local warlords.”<sup>56</sup> Mobutu’s legacy included an army with a divided and overlapping

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54. José E. Arvelo, *International Law and Conflict Resolution in Columbia: Balancing Peace and Justice in the Paramilitary Demobilization Process*, 37 GEO. J. INT’L L. 411, 413 (2006).

55. BORELLO, *supra* note 8, at 13.

56. John Rapley, Op-Ed., *Congo’s Civil War*, THE JAMAICA GLEANER, June 26, 2003, available at <http://www.jamaica-gleaner.com/gleaner/20030626/cleisure/cleisure2.html>.

command structure, a product of a shifting system of patronage designed to ward off threats of coups.<sup>57</sup> Both Laurent and Joseph Kabila relied heavily on a small presidential guard for their own security, leaving the army weak, underfinanced, and largely untrained.<sup>58</sup> The International Crisis Group described government security forces as “emasculated,” hamstrung by “confusion on the army’s role, weak police, negligible civilian oversight, tribalism, unequal treatment, [and] rampant corruption.”<sup>59</sup> Joseph Kabila had little reason to put faith in his security forces; his presidency was the direct result of his father’s relatively easy defeat of the Congolese Army only a few years before.<sup>60</sup> Furthermore, the main rebel groups had effectively run vast portions of the country throughout the conflict, in defiance of state authority. Negotiating without a viable stick, the government was in no position to insist on or enforce accountability measures even if it desired to do so.

Fourth, the international community did not show the interest or commitment necessary to counteract these powerful factors, as it pushed for immediate peace at the expense of justice. While the international community played a positive role in brokering the peace deal, it failed to use its position as broker to push for robust accountability measures as a component of the peace and transition. Faced with a daunting diplomatic task in negotiating a peace agreement, the international community was primarily concerned with securing a peace that would lessen the conflict’s threat to regional stability. Human Rights Watch characterized the international community’s approach: “Having spent much effort trying to end the war in the DRC, and satisfied with the withdrawal of foreign troops and Congo’s disavowal of Rwandan rebels, the international community appeared willing to mute its calls for accountability in hopes of ensuring the hard-won semblance of stability.”<sup>61</sup>

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57. INT’L CRISIS GROUP, AFRICA REPORT NO. 104, SECURITY SECTOR REFORM IN THE CONGO 2 (Feb. 13, 2006), available at <http://www.crisisgroup.org/home/index.cfm?id=3946>.

58. *Id.* at 3.

59. *Id.*

60. *Id.* at 2.

61. HUMAN RIGHTS WATCH, WORLD REPORT 2003 28 (2003), available at <http://www.hrw.org/wr2k3/africa3.html>.

While the U.S., EU, and UN called for an end to human rights abuses,<sup>62</sup> none made accountability for past human rights abuses a priority in pursuing peace. Each focused on ending the war immediately by de-prioritizing accountability,<sup>63</sup> calls for which might well have delayed or derailed the emerging peace agreement. Absent a voice in the international community for accountability measures, there was no strong advocate for justice as an integral part of the peace agreement and transition.

The combination of these factors left the initial peace agreement without mechanisms in place to pursue accountability and justice. Overwhelming war fatigue and the culpability of all parties for gross human rights violations meant that without a strong voice in the negotiations pushing for justice, accountability was likely to be left out of the agreement. The central government was unlikely to insist on accountability measures for fear of exposing its own soldiers and senior government officials to prosecution. Even if given the political will, the government lacked the military strength necessary to enforce the issue. The international community, viewing an end to immediate hostilities as the best realistic outcome, set aside accountability in the peace negotiations. These factors together precipitated a peace agreement and transitional structure that allowed for total impunity for egregious human rights violations.

## V. THE LEGACY OF THE TRANSITION

This paper does not argue that justice ought to have played a larger role in the initial peace agreement and transition, nor does it argue that the agreement appropriately balanced peace and justice. It is neutral on this issue. The purpose of the preceding section was to explain how impunity has been imbedded in the peace process and transition, so as to understand the sources and strength of the structures contributing to impunity for human rights abuses in the DRC today. Each of the four factors that caused justice to be assigned such a low priority in the transition continues to be relevant today. While the transition and subsequent peace agreements may have produced favorable changes in the short term, the DRC must break away from its

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62. *Id.* at 28-31.

63. *See id.* at 28.

strategy of buying peace if it is to find a lasting solution to the conflict.

The peace agreement and transitional government produced favorable results in the short-term. It was fairly successful in achieving its primary goal—a short-term cessation of hostilities.<sup>64</sup> A national army was created, and security in many areas of the country improved dramatically.<sup>65</sup> Critically, security was good enough to allow for surprisingly fair and incident-free elections in 2006, giving the Congo its first democratically elected government since independence.<sup>66</sup> Elections, the top priority of the international community throughout the peace process,<sup>67</sup> produced a decisive victory for Joseph Kabila—who won 58% of the vote—and his alliances, which won a clear majority in parliament, the upper house of the national legislature, and most of the provincial governorships.<sup>68</sup> For the first time since 1965, the DRC had an elected government with a popular mandate, and a hope of establishing a stable, functioning state.

Tragically, however, violence escalated in the eastern region of the Congo, particularly in North and South Kivu, exacting a horrific toll on an already desperate population.<sup>69</sup> It appears that the strategy of the negotiations—purchasing peace and promoting human rights violators to positions of power—has continued throughout the transition and into the post-election DRC.<sup>70</sup> In 2005, the government struck a deal with rebel leaders in the war-torn Ituri district, in which six were named to the rank of general in the newly integrated Congolese army and thirty-two others were named to other senior ranks such as colonels, lieutenant-colonels,

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64. See Stearns, *supra* note 6, at 202.

65. *Id.*

66. Jeffrey Gettleman, *Congo Votes in Its First Multiparty Election in 46 Years*, N.Y. TIMES, July 31, 2006, at A3.

67. HUMAN RIGHTS WATCH, ELECTIONS IN SIGHT: "DON'T ROCK THE BOAT"? 17 (Dec. 15, 2005), available at <http://www.hrw.org/legacy/backgrounder/africa/drc1205/drc1205.pdf>.

68. INT'L CRISIS GROUP, AFRICA BRIEFING NO. 44, CONGO: STAYING ENGAGED AFTER THE ELECTIONS 1 (Jan. 9 2007), <http://www.crisisgroup.org/home/index.cfm?id=4604&l=1>; Stearns, *supra* note 6, at 202.

69. See e.g. Jeffrey Gettleman, *Rape Epidemic Raises Trauma of Congo War*, N.Y. TIMES, Oct. 7, 2007, at A1 [hereinafter *Rape Epidemic Raises Trauma of Congo War*].

70. See Stearns, *supra* note 6, at 207.

and majors.<sup>71</sup> Among these were some of the “most notorious human rights offenders in the country,”<sup>72</sup> including Germaine Katanga, who would later be indicted by the ICC and is awaiting a September trial in the Hague.<sup>73</sup> Another round of army appointments with amnesty took place in 2006,<sup>74</sup> and again in November 2007.<sup>75</sup>

The same pattern continues today, most notably in the case of the leadership of the Congress for Defense of the People (CNDP). In early 2007, Laurent Nkunda—widely agreed to be responsible for appalling crimes against humanity in the Kivus<sup>76</sup>—agreed to an amnesty deal and an appointment as a general in the Congolese army, in exchange for a ceasefire and the integrations of his troops, though the deal quickly broke down.<sup>77</sup> Exposure of the Rwandan government’s years of support for the CNDP,<sup>78</sup> along with Nkunda’s increasingly bizarre behavior and calls for the overthrow of Kabila, made him an “embarrassment and a liability” to the Rwandan regime and paved the way for his arrest.<sup>79</sup> In a

71. *D.R. Congo: Army Should Not Appoint War Criminals*, HUM.RTS. WATCH, Jan. 13, 2005, <http://hrw.org/english/docs/2005/01/14/congo10014.htm>.

72. Stearns, *supra* note 6, at 205.

73. Press Release, ICC, Trial of Germain Katanga and Mathieu Ngudjolo Chui to Commence Thursday, 24 September 2009 (Mar. 27, 2009).

74. *Last Ituri Warlord Signs Peace Deal in DRC*, INDEPENDENT ONLINE, November 29, 2006, [http://www.iol.co.za/index.php?set\\_id=1&click\\_id=136&art\\_id=iol1164801638331L233](http://www.iol.co.za/index.php?set_id=1&click_id=136&art_id=iol1164801638331L233).

75. *DRC: Sixteen Ituri Warlords Give Up the Fight*, INTEGRATED REGIONAL INFORMATION NETWORKS, (Nov. 6, 2007), <http://www.irinnews.org/Report.aspx?ReportId=75168>.

76. See, e.g., *D.R. Congo: Arrest Laurent Nkunda for War Crimes*, HUM.RTS. WATCH, Feb. 1, 2006, <http://www.hrw.org/en/news/2006/02/01/dr-congo-arrest-laurent-nkunda-war-crimes> (describing how Nkunda’s troops killed, raped, and looted the property of civilians); INT’L CRISIS GROUP, AFRICA REPORT NO. 91, THE CONGO’S TRANSITION IS FAILING: CRISIS IN THE KIVUS 6 (Mar. 30, 2005) (describing how Nkunda’s forces indiscriminately raped and murdered civilians when taking Bukavu in 2004); The Secretary-General, *Report of the Secretary-General on Children and Armed Conflict in the Democratic Republic of Congo*, ¶ 8, delivered to the Security Council and the General Assembly, U.N. Doc. S/2007/391 (June 28, 2007) (describing the “disastrous humanitarian consequences” in North Kivu because of frequent outbreaks of fighting.).

77. *Id.* at 11.

78. Although the CNDP was officially founded in December 2006, it was no more than a rebranding of the RDC previously led by Laurent Nkunda. Consequently, I use the name CNDP throughout the article because it is the most up to date name of the Tutsi rebels formerly under the command of Laurent Nkunda, but may in places be referencing what was at the time known as the RDC.

79. See *id.*; See also Jeffrey Gettleman, *Rwanda Stirs Deadly Brew of Troubles in Congo*, N.Y. TIMES, Dec. 4, 2008, at A6; Julian Borger, *Rwandan and Congolese*.



"fantastically cynical move," however, the Rwandan and Congolese government's collaborated with and promoted Bosco Ntaganda, Nkunda's former chief of staff who had been indicted by the ICC for war crimes, in order to facilitate the arrest.<sup>80</sup> In a joint news conference on January 16, 2009, Ntaganda stood side by side with the Congolese minister of the interior and the head of the police, and announced the CNDP would join the Congolese and Rwandan armies in operations to fight the Forces Democratiques de Liberation du Rwanda (FDLR).<sup>81</sup> As a part of the deal, Ntaganda was given "money from Kinshasa, encouragement from Kigali and a guarantee that the Congo would grant him amnesty and protect him against International Criminal Court (ICC) prosecution."<sup>82</sup> The DRC's minister for justice quietly went to The Hague to inquire about having Ntaganda's arrest warrant suspended, and Innocent Kayina, Ntaganda's compatriot being held in Kinshasa for war crimes, was released.<sup>83</sup> Rwanda and the DRC—both of which are obligated by law to arrest Ntaganda and turn him over to the ICC<sup>84</sup>—as well as MONUC now work so closely with Ntaganda that "[j]ournalists report seeing documents referring to him as deputy co-ordinator" of military operations.<sup>85</sup> In this context, Nkunda's arrest and possible prosecution appears to be a product of circumstance, rather than a fundamental shift in policy. The strategy of purchasing peace and promoting human rights violators continues.

Such a strategy was effective in paving a path towards an elected government, but its potential to produce a long-term peace in the Congo is highly doubtful. The policy of "containment,

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*Authorities Fuelling Humanitarian Disaster, Warns Major UN Report*, THE GUARDIAN (U.K.), Dec. 13, 2008, <http://www.guardian.co.uk/world/2008/dec/13/congo-rwanda-militias-united-nations>.

80. *Congo's Dangerous Crossroads*, ENOUGH, Jan. 30, 2009, <http://www.enoughproject.org/publications/congos-dangerous-crossroads>.

81. *DR Congo: Arrest Bosco Ntaganda*, HUM. RTS. WATCH, Feb. 2, 2009, <http://www.hrw.org/en/news/2009/02/02/dr-congo-arrest-bosco-ntaganda>.

82. INT'L CRISIS GROUP, AFRICA REPORT NO. 150, CONGO: FIVE PRIORITIES FOR A PEACEBUILDING STRATEGY 7-8 (May 11, 2009) [hereinafter CONGO: FIVE PRIORITIES FOR A PEACEBUILDING STRATEGY].

83. *Id.* at 8.

84. *Congo's Dangerous Crossroads*, *supra* note 80.

85. Antonis Pappasolomontos, *Violence Brings Reward in the DRC*, THE GUARDIAN (U.K.), May 5, 2009, <http://www.guardian.co.uk/commentisfree/2009/may/05/congo-war-crimes>.

appeasement, and international emphasis on the holding of elections<sup>86</sup> pursued during the transition is not a recipe for a stable peace; it is a recipe for perpetual blackmail of the government in Kinshasa. Dissatisfied groups understand that if they are sufficiently violent and troublesome, they will be rewarded with high-level appointments in the Congolese government or army. This strategy incentivizes brutality. Without a change in tactics, the state is doomed to be held eternally hostage by a series of belligerents seeking power and prosperity.

#### VI. THE CNDP, THE FDLR, AND THE CASE FOR INTERNATIONAL ACCOUNTABILITY

The persistent failure of the peace process in the eastern Congo to date makes clear that a change in strategy is required to secure a stable peace. The rules of the game in the eastern Congo, which has been so well established after years of containing and appeasing belligerents, must be changed. Ending the culture of impunity through the arrest and trial of prominent rebel leaders in the Kivus in the ICC would be such a change, and, it would also create an opportunity for peace. While accountability itself is not a panacea, here, in the particular case of the Congo, there is reason to believe both (1) that puncturing the armor of impunity for atrocities in the eastern Congo is a necessary step in securing a long-term peace; and (2) accountability would have a deterrent effect on belligerents in the region. This section will describe the conflict in the Kivus in particular, argue for the imposition of accountability as a necessary and positive contribution to the peace process, and briefly defend the ICC as well suited to impose accountability in the short-term.

##### *A. The Conflict in the East*

The conflict in the Kivus is the epicenter of instability in the Congo. Like the broader conflict in the Congo, which eased considerably after the final act and through the transition, the fighting in North Kivu involves multiple armed groups, is rooted in historical ethnic grievances, and is further complicated by the ever-

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86. INT'L CRISIS GROUP, AFRICA REPORT NO. 133, CONGO: BRINGING PEACE TO NORTH KIVU i (Oct. 31, 2007).

changing goals of the parties involved.<sup>87</sup> A brief sketch of the particulars of the conflict in North Kivu today is provided below.

There are several armed groups operating in the East. The CNDP, formerly led by Laurent Nkunda who is now under house arrest in Rwanda,<sup>88</sup> has been fighting the Congolese Army since December 2003.<sup>89</sup> With the army too weak to defeat Nkunda militarily, the civilian population bore the brunt of the deadlock. A renewed offensive by the Congolese army (FARDC) in August 2008 led to the eventual rout of Congolese troops by the militarily superior CNDP; CNDP marched to the outskirts of Goma, a strategic lynchpin, before declaring a unilateral cease fire in late October 2008.<sup>90</sup>

The Congolese army's offensive did not rely exclusively on regular FARDC troops, but it enlisted the assistance of FDLR, the roughly 6,000 Hutu militiamen led by perpetrators of the Rwandan genocide who fled into the Eastern Congo in 1994,<sup>91</sup> and the Mayi-Mayi militias.<sup>92</sup> The FDLR has been guilty of continued atrocities against Congolese Tutsis and other civilians since the genocide,<sup>93</sup> which provides the CNDP's stated *raison d'être*, protecting the eastern Congo's Tutsi population from further atrocities.<sup>94</sup> The continued fighting has created a "self-fulfilling prophecy [in which] [e]very military offensive, with its abuses against innocent civilians, fans the flames of [historical] anti-Tutsi sentiment," lending credence to the CNDP's claim to be the protecting Congolese Tutsis and the Banyarwanda community of East Congo<sup>95</sup> from

87. See generally Human Rights Watch, *Renewed Crisis in North Kivu*, 19 HUM. RTS. WATCH (2007) No. 17(A), available at <http://www.hrw.org/sites/default/files/reports/drc1007webwcover.pdf> [hereinafter *Renewed Crisis in North Kivu*].

88. CONGO: FIVE PRIORITIES FOR A PEACEBUILDING STRATEGY, *supra* note 82, at 12.

89. CONGO: BRINGING PEACE TO NORTH KIVU, *supra* note 86, at 3.

90. CONGO: FIVE PRIORITIES FOR A PEACEBUILDING STRATEGY, *supra* note 82, at 2-3.

91. See Stephanie McCrummen, *For Tutsis of Eastern Congo, Protector, Exploiter or Both?*, WASH. POST, Aug. 6, 2007, at A01.

92. CONGO: FIVE PRIORITIES FOR A PEACEBUILDING STRATEGY, *supra* note 82, at 2.

93. *Renewed Crisis in North Kivu*, *supra* note 87, at 3.

94. REBECCA FEELEY & COLIN THOMAS-JENSEN, BEYOND CRISIS MANAGEMENT IN EASTERN CONGO 2 (2008), available at [http://enoughproject.org/files/publications/easterncongo\\_1208.pdf](http://enoughproject.org/files/publications/easterncongo_1208.pdf).

95. The Banyarwanda are Kinyarwanda speaking peoples of Rwandan descent.

mass murder.<sup>96</sup> The Tutsi minority and the largely Hutu civilian population of Eastern Congo each claim to require protection from one another.<sup>97</sup>

In a stunning reversal in January 2009, the Congolese government struck a deal with Rwanda, which had been quietly supporting the CNDP, to arrest Laurent Nkunda and collaborate to hunt down its former allies, the FDLR.<sup>98</sup> The CNDP's new leadership, Bosco Ntaganda, declared his forces would fight the FDLR alongside the FARDC.<sup>99</sup> There followed a month long joint operation involving 3,500–4,000 Rwandan troops on Congolese soil, which dispersed, but did not destroy, the FDLR.<sup>100</sup> Following Rwanda's withdrawal, the FDLR began retaking ground and "taking revenge on communities it believes supported the joint operation."<sup>101</sup> The numbers of displaced persons continue to rise as the returning FDLR commit atrocities including mass killings and mass rapes against the population.<sup>102</sup> Reprisal killings by the FDLR are mirrored by the FARDC with "each accusing civilians of supporting the other side."<sup>103</sup>

The dynamics of this conflict are constantly in flux, with an array of shifting alliances and fluid objectives for each party. The one constant in eastern Congo has been the "culture of impunity" for the staggering human rights abuses committed by all parties to the conflict.<sup>104</sup> Abuses committed by all parties—the CNDP, the FDLR, and the FARDC—are well documented.<sup>105</sup>

96. See CONGO: BRINGING PEACE TO NORTH KIVU, *supra* note 86, at 7-8. The report notes the historic role of anti-Tutsi sentiment in Congolese politics, as well as calls by local politicians for ethnic cleansing and extermination of the Tutsis and Banyarwanda, including candidates in the run up to the 2006 elections proclaiming themselves the "cure for Tutsi." CONGO: BRINGING PEACE TO NORTH KIVU, *supra* note 86, at 7, n.41.

97. *Renewed Crisis in North Kivu*, *supra* note 87, at 4.

98. *Congo's Dangerous Crossroads*, *supra* note 80.

99. CONGO: FIVE PRIORITIES FOR A PEACEBUILDING STRATEGY, *supra* note 82 at 7-8.

100. The Secretary General, *Twenty-Seventh Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, 2-4, U.N. Doc. S/2009/160 (Mar. 27, 2009) [hereinafter *Twenty-Seventh Report*].

101. CONGO: FIVE PRIORITIES FOR A PEACEBUILDING STRATEGY, *supra* note 82, at i.

102. Papasolomontos, *supra* note 85.

103. *DR Congo: 100,000 Civilians at Risk of Attack*, *supra* note 4.

104. *Id.* at 3, 5, 13, 27, 35; *Renewed Crisis in North Kivu*, *supra* note 87, at 58-63.

105. See *Renewed Crisis in North Kivu*, *supra* note 87, at 24-56.

### B. The Case for Accountability

The strategic change most likely to break the stalemate and create the conditions for a lasting peace is ending the culture of impunity through the arrest and trial of prominent rebel leaders in the eastern Congo. Two lines of analysis support this argument. First, given that ethnic based human rights violations in the Kivus are a key driver of the conflict, there is reason to believe that establishing accountability for those most responsible for atrocities is a necessary condition for peace in the region. Second, the imposition of accountability would have a positive deterrent effect on human rights violators, which would contribute to prospects for a lasting peace.

The history of impunity for ethnic-based human rights violations drives the current conflict in the Kivus, and "[t]he glaring absence of accountability for crimes against humanity continues to fuel conflict in eastern Congo."<sup>106</sup> There is reason to believe that a stable peace in eastern Congo cannot be achieved without establishing some form of accountability for human rights atrocities committed by the FDLR and Hutu extremists. The CNDP's strength lies in positioning itself as the protector of the Tutsi minority in eastern Congo, a position that stems directly from impunity for human rights violations on the part of Hutu extremists and the FDLR. The wealthy Tutsi business community has historically supported the CNDP because it saw it as "their last bulwark of protection" in the Kivus, without whom the Tutsis of Congo would face "a time-bomb" in the form of Hutu militias.<sup>107</sup> Laurent Nkunda's propaganda and recruitment campaigns explicitly relied on past atrocities, including distributing images and videos of Tutsis being burned and killed in Kinshasa and Bukavu.<sup>108</sup> With such atrocities going unpunished, the CNDP's claims to be the last line of defense against imminent genocide resonate with Congolese Tutsis, particularly among the disaffected populations in Rwandan refugee camps.<sup>109</sup> The arrest and trial of prominent leaders of the Hutu militias most responsible for human rights abuses against the Tutsi minority would drastically undercut

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106. FEELEY & THOMAS-JENSEN, *supra* note 94, at 8.

107. See *Renewed Crisis in North Kivu*, *supra* note 87, at 13. These quotes come from interviews with prominent businessmen and local leaders of the Tutsi community.

108. *Id.* at 7, n.44.

109. *Id.*

the CNDP's support structure. Having been soundly routed by the CNDP in late 2008, the government in Kinshasa has taken a key step towards peace by teaming with Rwanda to address the CNDP's reason for existing, the FDLR.<sup>110</sup> But a purely militaristic approach to the FDLR is not a sound strategy. It is unlikely to be successful, as evidenced by the FDLR's recent retaking of ground in the Kivus,<sup>111</sup> will not address the simmering ethnic tensions in the Congo nor persuade the Tutsi population that the Congolese government is serious about protecting them from ethnic violence. The arrest and trial of FDLR and Hutu extremist leaders most responsible for human rights abuses would deny the CNDP its most potent weapon: the perceived righteousness of its cause among the Tutsi community.

Similarly, a lasting peace is unlikely without the arrest and trial of the CNDP's leadership, including Bosco Ntaganda and Laurent Nkunda, for human rights atrocities. The CNDP has enjoyed "almost absolute" impunity, which has "contributed dangerously to tensions between communities."<sup>112</sup> Though Nkunda has been arrested, it is not clear whether he will be tried,<sup>113</sup> and even if he were, equally culpable CNDP leadership continue to enjoy impunity. Bosco Ntaganda, whose ICC indictment was unsealed in April 2008, "now holds a key position in the eastern command structure of the army."<sup>114</sup> Even in the context of a particularly brutal war, the CNDP men "have distinguished themselves" as human rights violators among the local population.<sup>115</sup> Suspecting "all non-Tutsi" of collaborating with the FDLR and Hutu militiamen, they have been given free reign to exact a terrible toll on the local population.<sup>116</sup> They have indiscriminately murdered and abducted civilians,<sup>117</sup> employed

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110. CONGO: FIVE PRIORITIES FOR A PEACEBUILDING STRATEGY, *supra* note 82, at 2.

111. *Rebels 'retake Congo positions,'* BBC NEWS, Mar. 1, 2009, <http://news.bbc.co.uk/2/hi/africa/7918038.stm>.

112. CONGO: FIVE PRIORITIES FOR A PEACEBUILDING STRATEGY, *supra* note 82, at 4.

113. *Id.* at 12-13.

114. Joe Bavier, *Congo passes amnesty law for eastern rebels* REUTERS, May 7, 2009, [http://www.reuters.com/article/idUSL71023868.\\_CH\\_2400](http://www.reuters.com/article/idUSL71023868._CH_2400).

115. McCrummen, *supra* note 91.

116. CONGO: BRINGING PEACE TO NORTH KIVU, *supra* note 89, at 7.

117. *DR Congo: Civilians in Peril*, HUM.RTS. WATCH, Oct. 23, 2007, <http://www.hrw.org/en/news/2007/10/21/dr-congo-civilians-peril>.

systematic rape of the population as a weapon of war,<sup>118</sup> and looted widely both for personal gain and to punish the population for supporting the FDLR.<sup>119</sup> Over a million people have been displaced from their homes,<sup>120</sup> with the CNDP seen as the chief cause of their suffering. Though the recent amnesty provision passed by the DRC for "acts of war," which excludes war crimes,<sup>121</sup> was probably necessary, the local population would be unlikely to acquiesce to any peace deal that denies them some semblance of justice. The leadership of the CNDP must be held accountable.

This argument is more than just intuitive; it is historically grounded. Indeed, an outraged civilian population played a large part in derailing Nkunda's January 2007 amnesty deal with the government.<sup>122</sup> The International Crisis Group reported that local communities "which had suffered at the hands of Nkunda's men" were outraged, while across the country, "citizens, who had been told for years that Nkunda was the main public enemy, a Rwandan puppet and the chief author of the massacres in the East, also looked with suspicion at the peace."<sup>123</sup> Remarkably, the nascent civil society rose to the task, with a public outcry that prompted "outraged articles in Kinshasa's press" and "[f]iery speeches by local and national politicians."<sup>124</sup> While there are several possible explanations for why the agreement broke down,<sup>125</sup> there can be no doubt that the public's response to the perceived unfairness of a peace deal without accountability measures for Nkunda played a part in derailing the deal. In fact, following Nkunda's arrest, the

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118. CONGO: BRINGING PEACE TO NORTH KIVU, *supra* note 89, at 5; see also *Rape Epidemic Raises Trauma of Congo War*, *supra* note 69.

119. *Renewed Crisis in North Kivu*, *supra* note 87, at 37.

120. *Twenty-Seventh Report*, *supra* note 100, at 5.

121. See *Amnesty Law for DR Congo Militias*, BBC NEWS, May 7, 2009, <http://news.bbc.co.uk/2/hi/africa/8037891.stm>.

122. See CONGO: BRINGING PEACE TO NORTH KIVU, *supra* note 86, at 9-10. While the terms of the deal are not fully known, it is suspected that they included an amnesty provision and integration of Nkunda's troops with the into mixed brigades.

123. *Id.* at 9.

124. *Id.*

125. *Id.* at 10. Other factors might have included the ambiguity of the terms, the lack of real commitment on either side, and the lack of an outreach campaign to inform the populace of the terms and assuage its fears.

population in North Kivu demanded his extradition to the DRC to face trial.<sup>126</sup>

More speculative, but historically grounded as well, is the risk that further violence and reprisal killings will take place against Tutsi communities if CNDP senior leadership is not held accountable, continuing the cycle of ethnic violence.<sup>127</sup> Even if the local community had not reacted violently to Ntaganda's participation in the army and Nkunda's uncertain future, the history of Tutsi persecution in the Kivus suggests that local and national politicians will use these cases to fan the flames of anti-Tutsi sentiment for political gain. In fact, this process began to take place in 2000, during the initial peace deal. Hard-line Congolese nationalists criticized the deal, somewhat counter-intuitively, for pulling the Kivus back into Rwanda's—and its Tutsi-led government's—"sphere of influence."<sup>128</sup> The history of ethnic-based conflict in the region, and the immediate turn to stirring up anti-Tutsi sentiment in response to a rumored amnesty deal for senior CNDP leader Nkunda, suggests that a lasting peace is unattainable without some measure of accountability in the region.

The second line of analysis supporting the imposition of accountability is that it will deter future violence and human rights abuses in the Kivus. There has been substantial scholarly debate as to the deterrent value of international criminal law in general and of the International Criminal Court in particular, especially after the high profile indictment of Sudanese president Omar Al Bashir.<sup>129</sup> Critics argue that proponents "have not a shred of

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126. Peter Clotey, *Kinshasa and Kigali Hold Talks Over Extradition of Rebel Leader*, VOICE OF AMERICA NEWS, Feb. 6, 2009, <http://www1.voanews.com/english/news/a-13-2009-02-06-voa5-68823297.html>.

127. See CONGO: BRINGING PEACE TO NORTH KIVU, *supra* note 86, at 8 (outlining the anti-Tutsi sentiment and the threat to the community as a whole).

128. *Id.* at 9.

129. See generally Nick Grono, *Detering Future Darfurs*, REUTERS, Mar. 4, 2009, <http://blogs.reuters.com/great-debate/2009/03/04/detering-future-darfurs/>; David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT'L L.J. 473 (1999) (arguing that the connection between international criminal accountability and deterrence of atrocities is at best hypothetical); Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7 (2001) (arguing that the imposition of international accountability through international tribunals and the ICC has begun to constrain potential criminal conduct); see also Nick Grono & Adam O'Brien, *Justice in Conflict? The ICC and Peace Processes*, in



evidence supporting their deterrence theories.”<sup>130</sup> This article’s purpose is not, however, to resolve this complicated debate in the general case. Instead it argues only that there is reason to believe that in the *particular* case of eastern Congo, imposition of accountability via the ICC would contribute meaningfully to the peace process by deterring human rights atrocities.

There is historic evidence to suggest that the ICC is capable of deterring, at least to some degree, Congolese rebel groups from committing human rights abuses constituting international crimes. As early as 2004, when the DRC Government first referred its case to the Court,<sup>131</sup> the International Center for Transitional Justice wrote that “there seems to be a growing consensus that the ICC should remain engaged in the DRC and that it could play a positive role in the peace process by breaking the cycle of impunity and acting as a deterrent.”<sup>132</sup> Indeed, the Congolese Minister for Human Rights noted that “[t]he announcement by the [P]rosecutor that he is considering bringing his first case in the Congo had a *pronounced deterrent effect* on the action of armed groups in Ituri [in northeastern Congo].”<sup>133</sup> MONUC’s human rights division noted that “the significant attention being paid to the ICC was having a deterrent effect in Ituri.”<sup>134</sup> While these statements are strong evidence of the impact of the ICC on the ground in the Congo, critics will point out that violence continued in Ituri following the initial indictments; and dismiss as misguided optimism the comments from the government, NGOs, and the UN.

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COURTING CONFLICT? JUSTICE, PEACE AND THE ICC IN AFRICA 13 (Nicolas Waddell & Phil Clark eds., 2008).

130. John R. Bolton, Under Sec’y for Arms Control and Int’l Sec., The United States and the International Criminal Court, Remarks to the Federalist Society (Nov. 14, 2002) (transcript available at <http://www.2001-2009.state.gov/t/us/rm/15158.htm>).

131. The ICC issued a press release discussing the referral of the case on April 19, 2004. The Prosecutor issued a press release discussing the opening of the investigation on June 23, 2004. ICC 01/04 - Updates - Democratic Republic of the Congo, <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/recent%20updates?lan=en-GB>.

132. BORELLO, *supra* note 8, at 31.

133. Anthony Deutsch, *Congolese Human Rights Minister: New Criminal Court Deters Tribal Warfare*, ASSOCIATED PRESS, Jan. 22, 2004, [http://www.publicinternationallaw.org/docs/PNW/PNW.26Jan\\_04.htm](http://www.publicinternationallaw.org/docs/PNW/PNW.26Jan_04.htm) (emphasis added).

134. William W. Burke-White, *Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo*, 18 LEIDEN J. INT’L L. 557, 589 (2005).

However, more difficult to dismiss are the words of the Congolese rebels themselves. This article relies heavily on William Burke-White's October 2003 interviews with rebel leaders in Ituri, which took place approximately a month and a half after the ICC first announced the opening of its investigation. These interviews indicate that "the ICC investigation is altering the thinking and possibly the behavior of criminal actors."<sup>135</sup> While the methodology is imperfect,<sup>136</sup> statements by the rebels themselves are strong evidence of the deterrent value of the ICC.

Several rebels reported that the Court's investigation was changing behavior in Ituri. The testimony of Thomas Lubanga, currently on trial before the ICC,<sup>137</sup> is the most useful in fleshing out what the abstract notion of deterrence might mean on the ground in the Congo. Ituri stated, "the Court has been a pressure on the political actors who were killing people . . . these people are very afraid today to commit such slaughter."<sup>138</sup> He also claimed that "there is a palpable pressure not to do certain things' and 'those responsible are now very worried.'"<sup>139</sup> In addition, Lubanga asked for a copy of the Rome Statute in French to go over with his lawyer,<sup>140</sup> further evidence that he was aware of and concerned by his potential exposure for "slaughter." Though it is not clear if Lubanga was speaking of the Court's deterring his own behavior or that of rebels in Ituri generally, Burke-White rightly points out that in either case "for one of the principle suspects of international crimes in the region to be actively interested in the text of the Rome Statute and to claim the Court was altering the

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135. *Id.* at 560-561.

136. *Id.* Burke-White notes several methodological problems; the small sample size, as only a few perpetrators agreed to be interviewed; the risk that interviewees would alter their statements in anticipation of indictments and prosecutions; and the myriad factors that might account for the reduction in major crime in Ituri, making it impossible to prove a statistically meaningful causal link between the ICC investigation and the reduction in atrocities. Nonetheless, "statements by perpetrators that the ICC has been causal of their behavior change" are the best and most direct evidence available.

137. Marlise Simons, *After Delays, Court Begins Congo Trial in The Hague*, N.Y. TIMES, Jan. 27, 2009, at A10; Marlese Simons, "International Court Begins First Trial", New York Times, January 26 2009.

138. Burke-White, *supra* note 134, at 587.

139. *Id.*

140. *Id.*

behaviour of suspected criminals is, at the very least, noteworthy.”<sup>141</sup>

Furthermore, Lubanga's statements are corroborated by the actions of Xavier Ciribanya, a former RCD rebel appointed Governor of South Kivu in the transition, whose bodyguards turned in arms to the UN Mission.<sup>142</sup> Though he questioned the ability of the court to arrest indicted offenders and wondered “if this Court will be stronger than [the government in] Kinshasa,” Ciribanya claimed that “[w]e all now are thinking twice. We do not know what this Court can and will do.”<sup>143</sup> This statement is noteworthy for two reasons. First it indicates that the mere prospect of investigation by the ICC has led rebels in Ituri to at least consider the relationship between their actions and a possible trial in the ICC; and second, it indicates that the deterrent value of the Court will be enhanced by effective prosecution of crimes in the region—that is, when the Court shows what it “can and will do.” As the court grows stronger and gains a track record of convictions in the Congo, its deterrent value will only increase.<sup>144</sup>

The evidence from the Government, NGOs, the UN, and rebels themselves suggests that the ICC investigation of crimes in Ituri was noticed by rebel groups and had at least some impact on their behavior. While it is not entirely clear what impact ICC deterrence had on the ground in Ituri,<sup>145</sup> the statement by Lubanga

141. *Id.* at 587-588.

142. *DR of Congo: UN Mission Helps Restore Calm to Bukavu*, UN News Service, Feb. 10, 2004, <http://www.un.org/apps/news/story.asp?NewsID=9725&Cr=democratic&Cr1=congo&Kw1=restore+calm&Kw2=&Kw3=#>.

143. Burke-White, *supra* note 134, at 588.

144. See Grono & O'Brien, *supra* note 129, at 14. (arguing that when the ICC secures convictions its credibility and deterrent value will be enhanced).

145. To the extent that direct evidence is not available, it is worth considering ICC deterrence in the context of Abram Chayes', *The Cuban Missile Crisis: International Crisis and the Role of Law* (1974). Chayes argues that in the Cuban Missile Crisis “[l]egal considerations—like military or diplomatic or political considerations—operated on decision not directly, but mediately, filtered through the different purposes, perspectives, and susceptibilities of the players in the central game.” *Id.* at 30. Here, while not a crisis situation, the imposition of legal accountability might operate as one of several considerations playing into a rebel's decision regarding tactics to be used in his insurgency. Chayes' article might also respond to the argument that violence has continued, to some degree, in Ituri and elsewhere in spite of continued investigation and several indictments. He points out that “even if conduct violates a relatively determinate legal standard, it does not necessarily follow that the action was unaffected by the law. Do we believe that the behaviour of a man travelling 65 miles an hour on a super-highway with a 60-miles-speed-limit was not constrained by law?” *Id.* at 26. Even if accountability does not end atrocities

that those who were killing people are hesitant to commit such slaughter today for fear of the ICC is excellent—albeit anecdotal—evidence of the ICC as a direct deterrent to “slaughter” of civilians. The impact of the ICC’s investigation in Ituri suggests that the imposition of accountability in the Kivus would have a similar deterrent effect.<sup>146</sup>

### *C. The International Criminal Court*

This paper has argued that the imposition of accountability through the arrest and trial of prominent rebel leaders in the Kivus would be a positive step for the peace process. While the ICC is not the only possible accountability mechanism—and it is the imposition of fair accountability in any form that is important—it is the most plausible source of immediate justice. It is quite possible that there may be a better vehicle for establishing fair accountability, but such an inquiry is beyond the subject of this paper.<sup>147</sup> A broad discussion of some issues to consider in choosing an accountability mechanism follows, supporting the ICC route as a sound choice.

Domestic accountability, even if desirable, is impossible in the short term. While the DRC seeks the extradition of Nkunda to be tried in the Congo<sup>148</sup> and Rwandan and Congolese government’s continue to negotiate his transfer,<sup>149</sup> the Congolese judicial system is not capable of delivering fair and impartial justice in the short term. The “justice sector is unable to deliver day-to-day rule of law for the population, let alone tackle massive rights abuses” and its

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in their entirety, a draw down in the scope and scale of human rights abuses may be rooted in to the cultivation of legal norms.

146. Critics who argue that the ICC’s small case load prevents it from acting as a general deterrent may well be right. However, the statements of Lubanga and Ciribanya support the specific deterrent value of the ICC shining a spotlight on a particular region. Ciribanya in particular stated “I hear they will go to Bunia [Ituri] first.” Burke-White, *supra* note 134, at 588 (suggesting rebels pay attention to the scope of the Court’s investigation).

147. For a good analysis of the challenges presented by the Congolese justice system and the possible mechanisms of transitional justice, see generally BORELLO, *supra* note 8.

148. *DR Congo Seeks Nkunda Extradition*, BBC NEWS, Jan. 23, 2009, <http://news.bbc.co.uk/2/hi/africa/7847639.stm>.

149. James Karuhanga, *DRC-Rwanda Justice Ministers Meet to Discuss Nkunda’s Fate*, NEW TIMES (Rwanda), May 6, 2009, <http://www.newtimes.co.rw/index.php?issue=13887&article=15470>.

infrastructure has "collapsed almost completely."<sup>150</sup> The domestic legal system "suffers from an almost absolute lack of independence from the executive" while "corruption seems to dictate the outcome of most judicial proceedings."<sup>151</sup> Congolese magistrates are "poorly trained, ill-equipped," and "not independent," thus facing "serious problems in implementing laws and delivering justice."<sup>152</sup> Bringing any suspect connected to the Kabila government to trial would be an "enormous challenge" given the "political interference" throughout the system.<sup>153</sup> Because the value of accountability for the peace process depends on independence and objectivity, even the unlikely prospect of a fair trial domestically would be undercut by the lack of credibility of domestic courts. The assumption would be that the punishment was a political act, rather than the cold and dispassioned imposition of justice. The value of accountability to the peace process depends on its appearing non-negotiable and even handed. The ICC is a good option for objective and credible justice.

International accountability, then, is essential in the short term. While international accountability could take a number of forms—perhaps a special tribunal or a hybrid court—each would take a good deal of time to establish. The ICC, already active and credible in the Congo, could have an immediate impact on the peace process in the Kivus. It would not be necessary, or possible, for the Court to prosecute *all* human rights violations in the region. Inevitably, "hard choices, given scarce resources" would have to be made as to who bears the highest degree of responsibility.<sup>154</sup> But prioritizing and immediately prosecuting those most responsible for atrocities could deter further abuses and break the cycle of violence, paving the way for a stable peace addressing the underlying<sup>155</sup> causes of the conflict and comprehensive reconciliation.

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150. DAVIS & HAYNER, *supra* note 35, at 25.

151. BORELLO, *supra* note 8, at 24.

152. DAVIS & HAYNER, *supra* note 35, at 25.

153. *Id.* at 26.

154. BORELLO, *supra* note 8, at 16.

155. CONGO: BRINGING PEACE TO NORTH KIVU, *supra* note 86, at ii. In addition to reconciliation and human rights issues, the Group notes the need to address many issues to secure a comprehensive and lasting peace. They include land rights, refugee repatriation, economic opportunity, inter-community relations, etc.

## VII. CONCLUSION

The conflict in the eastern Congo continues, subjecting an already beleaguered population to further displacement, violence, and human rights abuses. The strategy of appeasing human rights violators with high-level government appointments has persisted through the transition and into the present day, condemning the DRC to a continuing cycle of violence with no end in sight. If a lasting peace is possible, it will not be reached without a change in tack. To continue on the current course is to resign ourselves to the status quo—periods of conflict marked by mass displacement, horrific human rights abuses and the risk of regional war, followed by appointments in the government or army for those responsible. This is a recipe for failure.

Ultimately, a stable peace will require a comprehensive approach that addresses the infinitely complicated root causes of the conflict. There is no silver bullet, and the prospects for peace are slim. But prosecuting rebels in the eastern Congo for abusing human rights would be a valuable step in creating conditions necessary to address the underlying causes of the conflict. Without piercing the armor of impunity the prospects for a lasting peace are not even slim—they are non-existent.

